



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL REVISION NO. 2 OF 2011

1. **HUSSEIN GALGALO ALI 1ST APPLICANT**
2. **MAHAD OSMAN MAHAD 2ND APPLICANT**
3. **MUSTAFA ALI GIGAAL 3RD APPLICANT**

VERSUS

REPUBLIC RESPONDENT

RULING

By a letter dated 2nd December 2010 **MR. MAKASEMBO**, Advocate for the three Applicants sought a revision of the decision of the learned Principal Magistrate sitting in Kilifi Law Courts in **Criminal Case No. 811 of 2010 REPUBLIC –VS- HUSSEIN GALGALO AND TWO OTHERS**. In that case the three accused persons namely –

Hussein Galgalo Ali
Mahad Osman Mahad
Mostafa Ali Gigaal

were all charged with various offences under the Immigration Act Cap 172, Laws of Kenya. The record from the lower court indicates that all three accused persons pleaded guilty to the charge. The facts were read out by the prosecutor and the accused persons maintained their plea of guilty. They were each sentenced to serve six (6) months imprisonment and thereafter be repatriated to Somalia. Mr. Makasembo in his oral submissions to this court argued that the trial magistrate erred in imposing a six month sentence without the option of a fine. Had this been the only reason advanced in seeking a review, then I would have had no hesitation in dismissing this application for review. The question of sentence lies at the sole discretion of the trial court. The fact that a magistrate opts not to impose a fine does not make a sentence illegal or unlawful. In other words, whilst the trial magistrate is required to exercise this discretion in sentencing judiciously, the question of what sentence to impose lies at his sole discretion. No court is obliged to impose a fine on a first offender. If an accused is aggrieved by a sentence imposed then he is at liberty to appeal against such sentence, but not to seek a review from the High Court. I find no merit in this argument and I do dismiss the same.

I have perused both the typed and hand-written record of the proceedings before the lower court. It is of great concern that proceedings appear to have been conducted in the absence of a court clerk. If there was a court clerk present then it is not evident from the proceedings. All that is indicated is the date of plea **“8/11/10”** and the names of the three accused persons. No indication is given as to whether the charges were read out to the accused and if so in what language. The accused are merely recorded as

having pleaded guilty. The 3 accused face charges of Being unlawfully present in Kenya contrary to Section 13(2) of the Immigration Act. The particulars indicate that they were Somali citizens. At the very least I would have expected that a Somali Interpreter be in court to translate the charges and facts to them. There is no indication that any interpretation was done at all. I therefore find that this plea was not taken in accordance with the law as there is no evidence that there was a Court Clerk present in court and further no evidence that the charge and facts were properly communicated to the accused persons. This failure renders the subsequent proceedings including the sentence and repatriation order null and void. I set aside the proceedings of 8th November 2010 and direct that the three accused persons appear before the Principal Magistrate Kilifi Law Courts for their plea to be taken afresh. It is so ordered.

Dated and Delivered in Mombasa this 4th day of April 2011.

M. ODERO
JUDGE

In the presence of:
Mr. Makasembo for Applicants
Mr. Onserio for State

Mention 8th April 2011 at Kilifi Court.